

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 24 April 2006

BALCA Case No.: 2005-INA-123
ETA Case No.: P2004-NJ-02510141

In the Matter of:

R & M GENERAL CONTRACTORS, LLC,
Employer,

on behalf of

LUIZ HELENO SAMPAIO ROSA,
Alien.

Appearance: Cassandra C. Lamarre, Esquire, Newark, New Jersey
Rosaria M. Viana, Owner, Riverside, New Jersey¹
For the Employer

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal

¹ Although "Cassandra C. Lamarre, Esq." entered her appearance on behalf of the Employer and the Alien in this matter (AF 81), the rebuttal and Request for Review were filed by "Rosaria R. Viana, Owner Employer" (AF 23, 1).

Regulations (“C.F.R.”).² We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer, R & M General Contractors, LLC, filed an application for labor certification to enable the Alien, Luiz Rosa, to fill the position of “Truss Carpenter,” which was classified by the Job Service as “Carpenter” (AF 47). The address at which the Alien would work was listed as: “All New Jersey areas” (AF 47, Item 7). The job duties for the position, as stated on the application, were:

Erects, pre-made wood roof trusses on top plates of frame structures for residential & commercial construction by using hammer, nails, saws, levels & other hand & power tools. Prepares layout for positioning trusses from building plans & blueprints. Supervises one truss carpenter helper.

(AF 47, Item 13). The only job requirement was three years of experience in the job offered (AF 47, Item 14). The application was submitted under the Reduction in Recruitment (“RIR”) process (AF 39, 68).

On January 31, 2005, the CO issued a Notice of Findings (“NOF”), in which she approved the Employer’s request for RIR processing, but proposed to deny certification on the grounds that the Employer had not established that the job opportunity meets the definition of “Employment” as set forth in Section 656.3, that the Employer did not document that there is a *bona fide*, permanent, full-time year-round work for an employee other than oneself, and that the Employer did not document that the job opportunity has been and is clearly open to any qualified U.S. worker under Section 656.20(c)(8) (AF 36-38).

The Employer submitted its rebuttal on or about February 18, 2005 (AF 23-35).

² This application was filed prior to the effective date of the “PERM” regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

However, in the Final Determination, dated March 8, 2005, the CO found the rebuttal unpersuasive and denied certification (AF 18-21). On April 7, 2005, the Employer requested a review of the denial (AF 1-17). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals (“Board”).

On May 19, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. The foregoing Notice was mailed to various parties, including the Employer, the Employer’s counsel, and the Alien. Although no additional brief or statement of position was filed, the Employer had previously set forth the grounds for appeal in the Request for Review (AF 1).

DISCUSSION

In the NOF, the CO stated, in pertinent part:

Pursuant to 20 CFR 656.3 DEFINITIONS, “employment” means permanent full-time work by an employee for an employer other than oneself. Section 656.20(c)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be bona fide and that the job opening as described on Form ETA7-50 actually exists and is open to U.S. workers.

The employer’s listing at the Federal Employer Identification Number (FEIN) he submitted in the New Jersey Unemployment Insurance (UI) system has been inactive (dead) since June 23, 2002. Therefore, it does not appear that a job opening exists to which U.S. workers can be referred. Employer may rebut this finding by submitting evidence that clearly shows that the job offered constitutes permanent full-time employment in the context of your business operation. Rebuttal must include:

1. The number of years you have been in business. If employer claims to have employees, he must document why there is no current active listing for his company in the New Jersey UI system. If there is a listing, he must furnish name and number under which it is listed.
2. Documentation must also include copies of New Jersey Employer Quarterly Report, Employer Report of Wages and Withholding Tax, paid for all quarters from the year the application was filed to the present year. Failure to file these reports is a violation of 20 CFR 656.20(c), which states that employer’s job opportunity terms, conditions and occupational environment shall not be contrary to Federal, State or Local Law.

3. The total number of workers and the number of roof truss carpenters on staff in 2001, 2002, 2003, 2004 and currently, their names and job duties, whether full or part-time, employee or non-employee. Employer must furnish copies of W-2 or 1099-MISC forms, whichever are applicable, for 2001, 2002, 2003 and 2004 and Federal Employer Quarterly Taxes, form IRS 941, for the year this application was filed through the present year.
4. Employer must also document how he can guarantee permanent full-time work performing the duties of a roof truss carpenter as shown on the 7-50A form. Such documentation must include, but is not limited to, copies of contracts, invoices, etc for the year the application was filed through the present year.

(AF 37).

The Employer's rebuttal was limited to the following submissions: a letter, dated February 14, 2005, signed by Rosaria M. Viana (AF 23); a statement from Rita Howe of "Certified HR Services" (AF 24); and copies of the first page of the Employer's Federal Income Tax returns for 2001, 2002, and 2003 (AF 25-27). In summary, Ms. Viana stated that she is the Employer's Owner and currently has four full-time employees including herself. She also stated that the company has been in business since September 1998, but that the FEIN number is inactive because she entered into a Certified Staffing Service Agreement with another company in March 2002. Furthermore, Ms. Viana asserted that the number of employees is not pertinent, and that the job opportunity is available to U.S. applicants, but the Employer had "no luck" with its recruitment effort (AF 23). The statement by Ms. Howe of "Certified HR Services" reports that the Employer's payroll taxes are paid "under Certified Staffing Services Corp. I" under the latter's FEIN, and confirms that Certified Staffing Services Corp. entered into an employee staffing agreement with the Employer in March 2002 (AF 24). Ms. Howe's statement states that "Certified Staffing Services Corp I provides staff to R & M General Contracting and we collect and remit their payroll taxes under our FEIN." Finally, the Federal Income Tax Return for 2003 does not list any amount for salaries and wages (AF 25).³

In the Final Determination, the CO stated, in pertinent part, that the Employer had failed to provide most of the requested documentation, or otherwise establish that it can guarantee permanent full-time work and/or that a *bona fide* job opening exists for U.S. applicants.

³ In contrast, the 2001 and 2002 tax returns revealed wages of \$169,000 and \$88,418, respectively (AF 27-28).

Furthermore, the CO determined that the rebuttal evidence suggests that the staff personnel are employees of Certified HR Services, not the Employer. Accordingly, the CO denied certification (AF 18-21). We agree.

The requirement of a bona fide job opportunity arises out of section 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. and Alireza Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate) (the job must truly exist and not merely exist on paper). The employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*) (adopting *Pasadena Typewriter*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*).

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Moreover, the Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer here has failed to provide such documentation, we find that labor certification was properly denied. Moreover, as stated by the CO, the rebuttal evidence tends to undermine the Employer's assertion that there is a *bona fide*, full-time position open to qualified U.S. workers. To the contrary, the rebuttal evidence presented by the Employer indicates that it uses a staffing agency (AF 23-24), and no longer has employees to whom it pays salaries or wages (AF 25).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.